

ORIGINAL

83-5077

No. A-960

RECEIVED

JUL 25 1983

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

GERALD SMITH,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSOURI

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

JOHN ASHCROFT
Attorney General of Missouri

JOHN M. MORRIS III
Assistant Attorney General

P. O. Box 899
Jefferson City, MO 65102
(314) 751-3321

Attorneys for Respondent

Office - Supreme Court, U.S.
FILED

JUL 25 1983

ALEXANDER L. STEVAS.
CLERK

INDEX

Table of Authorities

Cases Cited	ii
Constitutional Provisions and Statutes Cited...	ii
Opinion Below	1
Statement of the Case	1
Argument	1
Conclusion	7

TABLE OF AUTHORITIES

Cases Cited

<u>Godfrey v. Georgia</u> , 446 U.S. 420 (1980).....	5, 6, 7,
<u>Harris v. Pulley</u> , 692 F.2d 1189 (9th Cir. 1982), <u>cert. granted</u> , 51 U.S.L.W. 1144 (March 22, 1983)....	2, 3, 4
<u>People v. Harris</u> , 28 Cal.3d 935, 171 Cal.Rptr. 679, 623 P.2d 240 (1981):.....	3
<u>Rose v. Lundy</u> , 455 U.S. 509 (1982):.....	3
<u>Sandstrom v. Montana</u> , 442 U.S. 510 (1979).....	3
<u>State v. Bolder</u> , 635 S.W.2d 673 (Mo. banc 1982), <u>cert. denied</u> , ___ U.S. ___, 103 S.Ct. 770 (1983)....	2, 3
<u>State v. Oliver</u> , 520 S.W.2d 99 (Mo.App., Spr.D. 1975):....	2
<u>State v. Smith</u> , 649 S.W.2d 417 (Mo. banc 1983).....	4, 5, 7
<u>Street v. New York</u> , 394 U.S. 576 (1969):.....	3
<u>Webb v. Webb</u> , 451 U.S. 493 (1981).....	2, 5

Constitutional Provisions and Statutes Cited

§ 565.001, RSMo 1978	1
§ 565.012.2(7), RSMo 1980 Supp.	5
§ 565.014.3(3), RSMo 1978	2, 3, 4
Missouri Supreme Court Rule 84.17	2

The opinion of the Supreme Court of Missouri affirming petitioner's conviction of capital murder and sentence of death is reported as State v. Smith, 649 S.W.2d 417 (Mo. banc 1983).

STATEMENT OF THE CASE

Petitioner Gerald Smith was convicted of capital murder, § 565.001, RSMo 1978, and was sentenced to death for the murder of Karen Roberts. The facts of this crime are extensively set out in State v. Smith, 649 S.W.2d 417, 420-421 (Mo. banc 1983), and will not be restated here. Respondent would note that the facts as stated in petitioner's petition are self-serving and argumentative in that he omits all reference to the evidence establishing his guilt and advances factual issues which were rejected by the verdict of the jury.

Of the two claims presented by petitioner in his present petition, the first (relating to the Missouri Supreme Court's procedure of proportionality review) was raised for the first time in petitioner's Motion for Rehearing following the issuance by the Supreme Court of its opinion affirming his conviction and sentence. Under Missouri law, motions for rehearing may not be used to present new issues to the court (see respondent's Argument, infra). Petitioner's second contention, that the aggravating circumstance found in his case was constitutionally invalid because the Missouri Supreme Court had not defined the types of criminal conduct covered by it, has never been advanced to any state trial or appellate court.

ARGUMENT

1. Proportionality Review of Death Sentence

The first of two theories advanced by petitioner is that the Missouri Supreme Court failed to conduct a proper review on the issue of whether his death sentence was "excessive

or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant," § 565.014.3(3), RSMo 1978, which review petitioner claims was required as a matter of "due process." Petitioner's attempt is to bring his case within the scope of the issue currently before this Court in Pulley v. Harris, No. 82-1095 (cert. granted March 22, 1983).

A major initial difficulty with this contention, wholly unaddressed by petitioner in his petition, is that the present claim has not as yet been presented in any reviewable fashion to the Missouri courts. Petitioner's first attempt to challenge the Missouri Supreme Court's process of proportionality review came after the appellate affirmance of his conviction and sentence, in his Motion for Rehearing before the Supreme Court. Under long-established Missouri law, legal claims and theories are not properly reviewable when raised for the first time in motions for rehearing after the issuance of the opinion by the appellate court. State v. Bolder, 635 S.W.2d 673, 693 (Mo. banc 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 770 (1983); State v. Oliver, 520 S.W.2d 99, 101-102 (Mo.App. Spr.D. 1975). Missouri Supreme Court Rule 84.17 states that "[t]he sole purpose of a motion for rehearing is to call attention to material matters of law or fact overlooked or misinterpreted by the court, as shown by its opinion." In light of these authorities, the present contention is not properly reviewable in the present petition. As this Court has noted,

"It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system" (citations omitted). Webb v. Webb, 451 U.S. 493, 496-497 (1981).

Since there is not the slightest indication from the Missouri Supreme Court's opinion that it reviewed petitioner's improperly-raised claim, cf. State v. Bolder, supra, at 693, it cannot be said that they were "adequately presented in the state system." Street v. New York, 394 U.S. 576, 582 (1969). Unless and until petitioner makes some attempt to properly present this issue in a state court, review in the federal system is inappropriate. See Rose v. Lundy, 455 U.S. 509, 518 (1982).

Even ignoring petitioner's failure to obtain a state court adjudication of the issue he currently presents, the absence of a legitimate ground for the granting of a writ of certiorari is apparent from the record. To begin with, it is absurd for petitioner to equate the situation in the case at bar with that in Pulley v. Harris, supra. In Harris, the California Supreme Court made no mention of the proportionality issue in its opinion affirming the defendant's conviction and sentence, People v. Harris, 28 Cal.3d 935, 171 Cal.Rptr. 679, 623 P.2d 240 (1981), and the Ninth Circuit concluded therefrom that the state court "gave no indication that any type of proportionality review...was undertaken." Harris v. Pulley, 692 F.2d 1189, 1196 (9th Cir. 1982), cert. granted, 51 U.S.L.W. 1144 (March 22, 1983). In the present case, by contrast, the Missouri Supreme Court explicitly reviewed and discussed this issue in its opinion:

"We turn now to the statutorily mandated review of defendant's death sentence. \$ 565.014.

* * *

Considering the crime and the defendant, we have reviewed the records of the twenty-two capital cases in which death and life imprisonment have been submitted to the jury under the law effective May 26, 1977, in which the jury agreed on punishment and which have been denied on appeal. Here the record discloses that defendant (1) caused the death of Karen Roberts by (2) brutally beating her

with an iron bar while (3) intending her to suffer, (4) causing her to suffer, (5) cold-bloodedly planning the murder four months in advance, and that (6) defendant is without remorse. This sentence of death is not disproportionate to the penalty imposed in similar cases, and the judgment is affirmed." State v. Smith, 649 S.W.2d 417, 434-435 (Mo. banc 1983).

In the face of this language, it cannot legitimately be asserted by petitioner that certiorari should be granted in this case under the aegis of Pulley v. Harris, supra.

To the extent that it does not consist of a series of cited platitudes (Petition at 6-10), petitioner's argument seems to be that, because the Missouri Supreme Court did not extensively cite, compare and discuss in its opinion the other cases before it in which the sentences of death and life imprisonment were submitted to the jury, "one may conclude" that the court failed to conduct a proper review on the issue of proportionality (Petition at 10-14).¹ Petitioner elaborates upon this allegation by imputing improper motives to the Supreme Court, describing its proportionality review as a "rubber-stamp" process indicating a "hollow commitment to the principles established in this Court's opinions" (Petition at 4). The difficulty with these assertions is that, whatever petitioner might wish to conclude, this is an issue of fact and the record is devoid of the slightest evidence which would support his allegations. In its opinion affirming his conviction and sentence, the Supreme Court

¹In the course of his argument, petitioner misreads the Missouri Supreme Court's opinion as indicating that it considered only cases in which the defendant had been sentenced to death (Petition at 11-12). Not only is this assertion refuted by a review of the language quoted above ("cases in which death and life imprisonment have been submitted to the jury"), but a reading of the Supreme Court summaries of capital murder cases, prepared pursuant to § 565.014.6, show that only 11 involved a sentence of death and the remaining 14 imposed the alternative sentence for capital murder, life imprisonment with no possibility of parole for fifty years. If requested, respondent will supply certified copies of these summaries, which are contained in the Missouri Supreme Court's file on petitioner's appeal.

and, in comparing this case with other cases previously before it, concluded that petitioner's sentence was not excessive or disproportionate. State v. Smith, supra, at 434-435. Petitioner now asks this Court to conclude, on the basis of a completely silent record, that the Missouri Supreme Court was perpetrating a fraud when it stated that it properly considered the other cases in rendering its decision. Such an attempt by petitioner is insupportable. It cannot reasonably be argued, and petitioner does not even attempt to contend, that it is a matter of constitutional import whether all aspects of the state court's proportionality review appear on the face of the appellate opinion, or whether the details of this review are ascertained by other evidence. That being the case, petitioner's first claim presents no colorable issue which is reviewable by this Court on the present record.

2. Validity of "Vile, Horrible or Inhuman" Aggravating Circumstances

Petitioner's remaining claim is that the statutory aggravating circumstance found in this case, that "[t]he offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind," § 565.012.2(7), RSMo 1980 Supp., is unconstitutionally vague as applied in the State of Missouri. The essence of petitioner's theory seems to be that this Court's decisions require the Supreme Court of Missouri to promulgate some additional description or definition of this aggravating circumstance, without which the aggravating circumstance is invalid (Petition at 16). The initial point to be noted is that this "definition" theory was never advanced in any form before any state trial or appellate court; the only contention presented previously is that the aggravating circumstance at issue was unconstitutionally vague if construed to apply to the facts of this case. State v. Smith, supra at 433-434; see Godfrey v. Georgia, 446 U.S. 420, 433-434 (1980). Accordingly, the present claim should not be heard for the first time here. Webb v. Webb, supra at 496-497.

In any event, the argument by petitioner is unsupported by any cited decision of this Court. In Gregg v. Georgia, 428 U.S. 153 (1976), the holding of this Court was not that the present aggravating circumstance was constitutionally invalid unless and until the state courts adopted some additional description of the conduct proscribed, but that it was valid so long as it was not overbroadly applied in the individual cases. Gregg v. Georgia, supra, at 201. This holding was reaffirmed in Godfrey v. Georgia, supra; although this Court noted that the application of the aggravating circumstance in that case did not comport with the Georgia decisions discussing this circumstance, the essence of its decision is in the following language:

"The validity of the petitioner's death sentence turns on whether, in light of the facts and circumstances of the murders that he was convicted of committing, the Georgia Supreme Court can be said to have applied a constitutional construction of the phrase 'outrageously or wantonly vile, horrible or inhuman in that [they] involved... depravity of mind....' We conclude that the answer must be no.

* * *

There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not" (footnote omitted).

Id. at 432-433.

Nothing in this or any other decision states or implies a constitutional requirement that the state courts render additional descriptions or definitions of the aggravating circumstance, though such descriptions are unquestionably helpful in evaluating how the aggravating circumstance has been applied. See Godfrey v. Georgia, supra at 430-432. Rather, the constitutional issue is whether, under the facts and circumstance of the individual case reviewed, the application of the aggravating

circumstance to that case can be supported by a reasonable and meaningful construction of the statutory language--in short, whether there is any "principled way" to distinguish this case as "outrageously or wantonly vile, horrible or inhuman" as compared with other homicides. Curiously, this fact was recognized by petitioner in his brief before the Missouri Supreme Court, where his argument was framed in precisely the above terms; it is only in the present certiorari petition that he has evolved the erroneous notion that an additional definition was required to validate the present aggravating circumstance.

If properly reviewed under the holding of Godfrey, the facts of petitioner's murder of Karen Roberts amply support a finding that the murder was "outrageously or wantonly vile, horrible or inhuman in that involved torture...." State v. Smith, supra at 420-421, 434-435; cf. Godfrey v. Georgia, supra at 433. Nothing in the facts of this case warrants a review by certiorari of petitioner's conviction and sentence.

CONCLUSION

In view of the foregoing, the respondent respectfully submits that petitioner's petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN ASHCROFT
Attorney General of Missouri

John M. Morris III

JOHN M. MORRIS III
Assistant Attorney General

P. O. Box 899
Jefferson City, MO 65102
(314) 751-3321

Attorneys for Respondent